FILED
AUG 31 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 311.

DIXIE FEED AND SEED COMPANY, INC.,
and JAMES LEE JOHNSON,
Appellants,

vs.

STANIFER G. BYRD,
Appellee.

Appeal from the Court of Appeals of Tennessee.

MOTION TO DISMISS APPEAL.

H. KEITH HARBER,
400 Pioneer Building,
Chattanooga, Tennessee 37402,
Counsel for Appellee, Stanifer G. Byrd.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Opinions below	1
Statement of the case	2
Question presented	2
Question presented is not substantial	2
Conclusion	7

Cases Cited.

Baugh v. Rogers, 80 C. A. 2d 136, 181 P. 2d 387	4
Beck v. Lund's Fisheries, Inc., 53 Del. 45, 164 A. 2d 583	7
Bertrand v. Wilds, 198 Tenn. 543, 281 S. W. 2d 390	4, 5
Brauer Machine & Supply Co. v. Park Hill Truck Co., 383 Ill. 569, 50 N. E. 2d 836	2
Hess v. Pawloski, 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091	2, 3, 5
International Shoe Co. v. State of Washington, 326 U. S. 316, 66 S. Ct. 158, 90 L. Ed. 95	7
Kennelly v. Secord Transportation Co. (1959 D. C. N. Y.), 173 F. Supp. 247	4
Kohanovich v. Youree (1959), 51 Del. 440, 147 A. 2d 655, 73 A. L. R. 2d 1347	4, 5
Leighton v. Roper, 300 N. Y. 434, 91 N. E. 2d 876, 882, 18 A. L. R. 2d 537	5, 6
Mullane v. Central Hanover B & T Co., 339 U. S. 306, 94 L. Ed. 865 at 873	4
Olberding v. Illinois Central Railroad, 346 U. S. 338, 341, 74 S. Ct. 83, 85	7

Paduchik v. Mikoff, 158 Ohio St. 533, 110 N. E. 2d 562 ..... 3, 4
Pennoyer v. Neff, 5 Otto 714, 95 U. S. 714, 24 L. Ed. 565 6
Raspante v. Trans Supply, 214 N. Y. S. 2d 583, affirmed 11 A. D. 2d 1090, 207 N. Y. S. 2d 447 6
Schefke v. Superior Court of San Francisco (1955), 136 Cal. App. 2d 715, 289 P. 2d 542 5
Sipe v. Moyers, 353 Pa. 75, 44 A. 2d 263 at 264 ..... 3, 4
Stroo v. Farmer, 200 F. Supp. 344 4
Sugg v. Hendrix, 5 Cir., 142 F. 2d 740, 741 5,
Tardiff v. Bank Line, 127 F. Supp. 945 ..... 6, 7
Walters v. St. Louis, Mo. 1954, 74 S. Ct. 505, 347 U. S. 231, 98 L. Ed. 660 at 664 2
Wuchter v. Pizzutti, 276 U. S. 13, 72 L. Ed. 446, 48 S. Ct. 259 4

Statutes Cited.

3 A. L. M. C. 90, Sec. 3A 3, 4
Minnesota: M. S. A. 170.55 5
Mississippi: M. C. A. 9352.61 (1942) 5
New Hampshire: R. S. A. 1955, 264.1 5
New Jersey: N. J. S. A. 39:7-2 5
New Mexico: N. M. S. A. 1953, 64-24-3 5
Ohio: Page's Rev. Code, Secs. 2703.20, 2703.22 5
Pennsylvania: Purdon's Statutes 75-2001 5
Tennessee Code Annotated, Section 48.523 2
Tennessee Code Annotated, Section 20.224 ..... 2, 3, 5, 6
Texas: Vernon's Statutes, Art. 2039a 5

Textbook Cited.

8 Am. Jur., Automobiles and Highway Traffic, Sec. 862 3

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 311.

DIXIE FEED AND SEED COMPANY, INC., and JAMES LEE JOHNSON,
Appellants,

vs.

STANIFER G. BYRD,
Appellee.

Appeal from the Court of Appeals of Tennessee.

MOTION TO DISMISS APPEAL.

Appellee, Stanifer G. Byrd, moves the Court to dismiss this appeal on the ground that it does not present a substantial federal question.

OPINIONS BELOW.

The opinion of the Court of Tennessee is reported at 376 S. W. 2d. 745.

STATEMENT OF THE CASE.

Appellee does not take exception to appellants' statement of the case except to the extent that it does not explicitly point out that the operation of appellants' vehicle on the private property described was an incident to its operation on the public highways of Tennessee.

In view of the present posture of the case and particularly the opinion of the Tennessee Court of Appeals on the petition to rehear relating to T. C. A. 48-923, we deem it unnecessary to discuss the facts pertaining to appellants' being amenable to process under this statute. See **Statement as to Jurisdiction**, Appendix, page 24; **Walters v. St. Louis**, Mo. 1954, 74 S. Ct. 505, 347 U. S. 231, 98 L. Ed. 660 at 664.

QUESTION PRESENTED.

Appellee considers only the "principal question presented" by appellants as material, which relates to T. C. A. 20-224, inasmuch as the other questions posed were unnecessary for decision and were therefore expressly pretermitted by the Tennessee Court of Appeals.

QUESTION PRESENTED IS NOT SUBSTANTIAL.

Appellants limit their claim to having raised a substantial federal question to the alleged conflict between Tennessee and Illinois decisions and to a conflict between the case at bar and **Hess v. Pawloski**, 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091.

The different conclusions reached by the Illinois court in **Brauer Machine & Supply Co. v. Park Hill Truck Co.**, 383 Ill. 569, 50 N. E. 2d 836, and the case at bar arise out of different wording of the Illinois statute. The constitutionality of the statute was not a real issue in the **Brauer** case since a careful reading of the statute, as set out in

the opinion (50 N. E. 2d at 842), shows that by its terms it relates only to vehicles while being operated "over the highways of the State of Illinois." Therefore, while it is apparent that the Illinois court did not regard the question in that light, the decision would more properly have been based on the language of the statute rather than the issue of constitutionality: See 8 Am. Jur. 2d, **Automobiles and Highway Traffic**, Sec. 862; **Paduchik v. Mikoff**, 158 Ohio St. 533, 110 N. E. 2d 562.

It is to be noted that there is a distinct dissimilarity between the Illinois statute and the Tennessee provision. The Illinois statute refers to "the use and operation . . . over the highways of the State of Illinois . . . in any action . . . growing out of such use . . .," whereas T. C. A. 20-224 refers to "any civil action . . . arising out of **any accident** or injury **occurring in this state** in which such vehicle is involved." (Emphasis added.)

There is no conflict between the decision in the case at bar and **Hess v. Pawloski**, supra. The latter case clearly was brought as a result of the use of a motor vehicle on a public highway in Massachusetts and the law of that state, unlike T. C. A. 20-224, employs the phrase "while operating a motor vehicle on such a way" and nowhere in this Court's decision is there any mention of the use of a motor vehicle on private property. We respectfully submit that the **Hess** case necessarily limits itself to accidents occurring on the public highway because the plaintiff's declaration therein and the statute, in the words quoted above, so limited the issues: See **Sipe v. Moyers**, 353 Pa. 75, 44 A. 2d 263 at 264.[1]

---

[1] It is of interest to note that the same statute, held to be constitutional in *Hess v. Pawloski*, supra, was amended by Acts 1953, Chapter 366, so that the material portion now reads:

"Sec. 3A. Operation of Motor Vehicle by Non-Resident, When Equivalent to Appointment of Registrar as Attorney, etc.—The acceptance by a person who is a resident of any

Wuchter v. Pizzutti, 276 U. S. 13, 72 L. Ed. 446, 48 S. Ct. 259, cited by appellants, decided only that a statute providing for service of process on a non-resident motorist by serving an officer of the state in which the accident happened is invalid unless express "reasonable provision" is made for forwarding notice of suit to the defendant. The issue in the case at bar is nowhere alluded to in the majority or dissenting opinions.[2]

The Supreme Court of Tennessee held in 1955 in **Bertrand v. Wilds**, 198 Tenn. 543, 281 S. W. 2d 390, that this statute extended to accidents occurring off the public highways. Aside from **Paduchik v. Mikoff** and **Sipe v. Moyers**, supra, the same ruling has been adopted in: **Kennelly v. Secord Transportation Co.** (1959 D. C. N. Y.), 173 F. Supp. 247; **Baugh v. Rogers**, 80 C. A. 2d 136, 181 P. 2d 387; **Kohanovich v. Youree** (1959), 51 Del. 440, 147 A. 2d 655, 73 A. L. R. 2d 1347; **Stroo v. Farmer**, 200 F. Supp. 344.

In **Sipe v. Moyers**, supra, and in **Bertrand v. Wilds**, supra, it was held that to restrict the extension of this type of service of process to accidents occurring on the public highway, where the language of the statute did not necessarily require such restriction, [illegible] constitutional

---

other state or country of the rights and privileges conferred by section three, as evidenced by the operation, by himself [illegible], of a motor vehicle thereunder, or the operation by such a person, by himself [illegible], of a motor vehicle on a way, or private way if entrance thereto was made from a way, or in any place to which the public has a right of access, in this commonwealth otherwise than under said section, shall be deemed equivalent to an appointment by him of the registrar, [illegible], to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him [illegible] growing out of any accident or collision in which such person [illegible] may be involved while operating a motor vehicle on such way or in such place, [illegible]." (3 A. L. M. C. 90, Sec. 3A) (Emphasis added.)

[2] As to the criteria of "due process" in terms of substituted service of process, see: *Mullane v. Central Hanover B & T Co.*, 339 U. S. 306, 94 L. Ed. 865, at 873.

grounds, would create an unreasonable and unrealistic distinction and would violate the remedial intent of that class of statute.[3]

In **Kohanovich v. Youree**, supra, the Delaware statute being, in the material respects, almost identical with T. C. A. 20-224, the court held that the statute should be so construed as to make the remedy available to all persons injured as a result of the negligent operation of an out-of-state car which had been driven over the highways of the state, provided that the use resulting in the accident was reasonably incidental to the use of the highways. This rule of incidental use was extended to an accident in a service station even under a statute limiting substitute service to accidents occurring "upon the highways" since the purchase of gasoline and servicing was incidental to highway use: **Schefke v. Superior Court of San Francisco** (1955), 136 Cal. App. 2d 715, 289 P. 2d 542.

Among the many other cases, apart from **Bertrand v. Wilds**, supra, and the cases previously cited, that have held the extension of substitute service to cover accidents occurring on private property as being a reasonable and constitutional extension of the state's police power, as affirmed in **Hess v. Pawloski**, supra, with respect to such statutes generally, are the following: **Sugg v. Hendrix**, 5 Cir., 142 F. 2d 740, 741; **Leighton v. Roper**, 300 N. Y.

---

[3] Statutes whose coverage in respect of accidents occurring on private property, is as broad as that of T. C. A. 20-224 will be found, inter alia, in:

Texas:	Vernon's Statutes, Art. 2039
Minnesota:	M. S. A. 170.55
Mississippi:	M. C. A. 9352.61 (1942)
New Hampshire:	R. S. A. 1955, 264:1
New Jersey:	N. J. S. A. 39:7-2
New Mexico:	N. M. S. A. 1953, 64-24-3
Ohio:	Page's Rev. Code, Sec. 2703.20, 2703.22
Pennsylvania:	Purdon's Statutes, 75-2001

434, 91 N. E. 2d 876, 882, 18 A. L. R. 2d 537; **Raspante v. Trans Supply**, 214 N. Y. S. 2d 583, affirmed 11 A. D. 2d 1090, 207 N. Y. S. 2d 447.

Appellants misconceive the right of the Tennessee Legislature to enact this type of regulation. The "police power" to regulate is by no means limited to highways and to construe T. C. A. 20-224 as finding its only *raison d'etre* in highway regulation is unreasonable and unwarranted. That the power of police regulation extends to private property per se is demonstrated, if necessary, by appellants' own pleading of Chattanooga city ordinances with respect to safety precautions on the situs of the accident against its co-defendant, Dixie Portland Flour Mills, Inc., in this case (R. 69-87). Restated, we submit that to speak of police regulatory power as being separate and apart from the police power to regulate the use of highways is a distinction without a difference.

While not expressly stated to be so, it is implicit in appellants' theory of immunity that it relies on the principle laid down in **Pennoyer v. Neff**, 5 Otto 714, 95 U. S. 714, 24 L. Ed. 565, with respect to the requirements of due process "respecting the jurisdiction of a court to render a judgment in personam against a defendant.": See **Tardiff v. Bank Line**, 127 F. Supp. 945, wherein is discussed the "fate" of **Pennoyer v. Neff.**[4] See also, on

[4] "The landmark case of Pennoyer v. Neff, supra, decided in 1866, sets up the requirements of due process respecting the jurisdiction of a court to render a judgment in personam against a defendant. One of those requirements is service of process on the defendant within the state. The doctrine of Pennoyer v. Neff, however, though venerable and long-revered, is primarily of historical importance today. After suffering substantial erosion from a series of subsequent decisions (citing authorities), finally, in International Shoe Co. v. State of Washington, 326 U. S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95, the Supreme Court gave it a decent burial and found that "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain mini-

due process and constitutionality of substitute process, **International Shoe Co. v. State of Washington**, 326 U. S. 316, 66 S. Ct. 158, 90 L. Ed. 95, and cf. **Olberding v. Illinois Central Railroad**, 346 U. S. 338, 341, 74 S. Ct. 83, 85.[3]

CONCLUSION.

For the reasons set out above, we submit there is no merit to appellants' contention that a substantial federal question is presented there being no conflict with prior decisions of this Court or of any state court, and appellee therefore moves that the appeal be dismissed.

H. KEITH HARBER,
Attorney for Appellee,
Stanifer H. Byrd.

---

minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Tardiff v. Bank Line, Ltd.*, supra.

[3] "It is true that in order to ease the process by which new decisions are fitted into pre-existing modes of analysis there has been some fictive talk to the effect that the reason why a non-resident can be subjected to a state's jurisdiction is that the non-resident "impliedly" consented to be sued there. In point of fact, however, jurisdiction in these cases does not rest on consent at all. See Scott, Jurisdiction Over Nonresident Motorists, 39 Harv. L. Rev. 563. The defendant may protest to high heaven his unwillingness to be sued and it avails him not. The liability rests on the inroad which the automobile has made on the decision of Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565, as it has on so many aspects of our social scene. The potentialities of damage by a motorist, in a population as mobile as ours, are such that those whom he injures must have opportunities of redress against him provided only that he is afforded an opportunity to defend himself. We have held that this is a fair rule of law as between a resident injured party (for whose protection those statutes are primarily intended) and a non-resident motorist, and that the requirements of due process are therefore met. Hess v. Pawloski, 247 U. S. 352, 71 L. ed. 1091, 47 S. Ct. 632." Frankfurter, J., 98 L. Ed. at 43. See also *Beck v. Lund's Fisheries, Inc.*, 53 Del. 45, 164 A. 2d 583.